We have said all for which we can afford space, or our readers probably find patience, as to the more common grounds of the public misapprehension, in regard both to the rights and duties of the legal profession. We hope, sometime, to discuss the misapprehensions and shortcomings of the profession, which, in our apprehension, are neither few nor unimportant.

I. F. R.

RECENT AMERICAN DECISIONS

Supreme Court of Illinois.

SAMUEL CHASE ET AL. *v.* CHARLES E. CHENEY.

Civil courts will interfere with churches or religious associations when rights of property or civil rights are involved, but where there is no other right involved than the clerical office, the decision of an ecclesiastical court as to its own jurisdiction under the canons of the association, is conclusive.

The right to preach the gospel to all who choose to listen is free to every citizen, but the right to preach it as a clergyman of an organized church with established doctrines and forms of worship, is limited by the will of the church, and when a minister enters a church he becomes bound by the rules and subject to the authority of the ecclesiastical government of the church.

By the canons of the Episcopal Church when a presentment against a presbyter for non-conformity is made in due form and citation is issued and served, the ecclesiastical court has jurisdiction to proceed to determine the cause.

The recital by the Bishop in the commission that he acted on "credible information" does not affect the regularity of the proceedings. The canon requires the bishop to appoint three persons to examine and make presentment, and such appointment need not be in writing.

The presentment is the substantial foundation of the proceedings, and its sufficiency can not be inquired into by a civil court.

Even if the sufficiency of the presentment could be inquired into by a civil court, it is not to be tested by the strict rules of criminal pleading, and sufficient certainty to enable the accused to know the nature and substance of the charge is all that can be required.

Per LAWRENCE, C. J., and SHELDON, J., dissenting: The civil courts ought to take cognisance of the case so far as to ascertain whether the ecclesiastical court is constituted in accordance with the canons of the church. By joining the church, which is a voluntary organization, the presbyter agrees to submit to the jurisdiction of a tribunal organized in accordance with the canons, but he has not agreed to submit to any other, and if a court improperly constituted assumes to try him for an offence which may involve loss of his ecclesiastical office, he has a right to invoke the protection of the civil courts of the state.

THIS was a bill in equity, filed in the Superior Court of Chicago, to enjoin plaintiffs in error as an ecclesiastical court, from

proceeding with the trial of the defendant, for alleged offences and misconduct as a presbyter of the diocese of Illinois, and rector of Christ Church, in the city of Chicago.

An injunction was granted, and thereupon defendants appealed to this Court.

The bill alleged the issuing of a commission, by the bishop of the diocese, appointing three persons as presenters; the finding the presentment; and a citation giving notice of the time and place of trial; that the accused, in person and by counsel, appeared when the court was organized, and preferred objections to the validity of all the papers, which were overruled, and claimed his right of challenge of the persons who were selected to try the issue, which was denied; that the commission, presentment and citation were void, and gave no authority to the assessors; that the accused received from his parish $4500 per annum, and enjoyed a rectory, rent free, and had received numerous calls from other parishes, in other dioceses, at much higher salaries; that he had not been guilty of any offence for which he was liable to be tried, and yet the bishop was prejudiced against him, had prejudged his case, and was determined to convict and deprive him of his position and its emoluments; that the respondents were selected to condemn; they sympathized with the bishop, and, with him, belonged to the High Church party; and that complainant was attached to the Low Church party in the Protestant Episcopal Church; and he and the bishop are diametrically opposed in their views.

W. C. Goudy and *S. C. Judd*, for appellants.

Melville W. Fuller, for appellee.

The opinion of the Court was delivered by

THORNTON, J. [After stating the facts.]—Without asserting the power of this court, in cases of this character, yet, on account of the earnest, and able, and elaborate arguments of counsel, we will notice the objection, that the spiritual court had no authority to adjudicate upon the alleged offence.

The objections are these: First, The bishop, by a recital in the commission that the information upon which he acted was "credible information," excludes the hypothesis that he exercised the power of appointment in either of the three modes mentioned in Section 2 of canon 20, and that he could only proceed as directed

therein. Second, That the presentment was insufficient in specification of time, place, and circumstance. Third, That eight presbyters did not appear, but only five, at the time and place of trial, when the attempted organization of the court took place, and that the accused was denied his right of challenge. Fourth, That there was in fact no notice given of the trial.

Except one, these objections are extremely technical.

There is in evidence a commission, issued by the bishop, appointing three persons to investigate the charge and make presentment. Presentment was found, containing three charges and divers specifications, as to offences committed while officiating as rector of Christ Church, in Chicago. A citation was signed by the bishop, fixing the time and place of trial, which, with a copy of the presentment, was duly served. The citation furnished the names of eight presbyters, from whom the accused might select five, or three, as assessors, and allowed twelve days in which to make the selection.

Was a commission necessary to confer jurisdiction? Did the court or the accused have any right to call for it? Concede that the bishop did not obtain his information from either of the sources specified in the canon, is the jurisdiction of the court thereby ousted? The canon requires no commission to be issued. By the canon the appointment need not be in writing. The bishop is compelled to appoint three persons to examine the case and presentment make. He performs this duty in such manner as he may choose.

If the court had jurisdiction of the subject-matter and the person, it had power to proceed. The subject-matter was contained in the presentment, not in the commission. The person had been summoned, and was present. Therefore, neither the source nor character of the facts communicated to the bishop, except as contained in the presentment, were proper subjects for inquiry by the church court. The offence charged was the matter to be investigated—the fact to be tried. If the accused had violated the constitution of his church, his engagement to conform to its doctrines and worship, and his ordination vow, as alleged, such violations could not be palliated by the errors of the bishop. If the bishop disregarded the canons, and transcended the limits of his power, as diocesan, he is amenable therefor, and liable to trial before his brother bishops. His transgression cannot excuse the

wrongful act of another—cannot be pleaded in justification, or to the jurisdiction. The court, then, upon presentment made, and due service, had power to take cognisance of, and decide, the case.

This view is sustained by a careful examination of the canon. Section 1 of canon 20, in prescribing the duties of the presenters, says: "If there be, in their opinion, sufficient grounds for a presentment, they shall present such clergyman to the bishop, who shall, thereupon, cause a copy of said presentment, together with a citation to appear and answer thereto, to be served upon the accused with all convenient speed."

Section seven of the same canon, in reference to the duties of the presbyters who may compose the court, says: "They shall declare in a writing, to be signed by them, or a majority of them, their verdict on the several charges and specifications contained in the presentment."

It will be seen that the accused is entitled to a copy of the presentment, not the commission, and to a citation. The court act alone on the presentment, and the evidence adduced.

Sustaining as we do, the jurisdiction of the ecclesiastical court, we might fairly waive any answer to the suggested defects in the presentment, and rely upon an authority furnished by counsel—*Walker* v. *Wainwright*, 16 Barb. 486. In that case the motion was made by the counsel for Walker, that Wainwright, the bishop, be required to show cause why the injunction previously granted, restraining the sentence, in accordance with the verdict of an ecclesiastical court, should not be made absolute. The learned judge said: "The only cognisance which the court will take of the case, is to inquire whether there is a want of jurisdiction in the defendant to do the act which is sought to be restrained. I cannot consent to review the exercise of any discretion on his part, or inquire whether his judgment, or that of the subordinate ecclesiastical tribunal, can be justified by the truth of the case. I cannot draw to myself the duty of revising their action, or of canvassing its manner or foundation, any further than to inquire whether, according to the law of the association, to which both of the parties belong, they had authority to act at all. In other words, I can inquire only whether the defendant has the power to act, and not whether he is acting rightly. * * * * The refusal of the defendant to issue a commission to take testi-

mony, his refusal to grant a new trial, the alleged misconduct of one of the court, are all matters which relate to the mode of procedure, and not to the right to proceed; and I repeat that it is the latter alone that I can take cognisance of."

The motion was denied and the injunction dissolved.

If we had the right to determine the sufficiency of the presentment, we should hold, as this court has held, in numerous decisions in criminal cases, that it is sufficient, if so plainly drawn that the nature of the offence may be understood. We should not test its correctness by the strict rules of criminal pleading.

The accused was informed by the presentment that, in his own church, in the city of Chicago, he had commited the alleged offences. The language is explicit as to their character. The omissions and alterations are plainly set forth. The place is definitely fixed. No particular day is averred. Was this necessary? The offences charged are mostly omissions. The rule is: "Where the offence consisted of an omission, it is not necessary to allege any time to it;" 2 Hawk. c. 25, s. 79. Even in criminal cases it is not necessary to prove the time precisely as laid. The particular day is not material in point of proof, and is merely a matter of form: Phillips Ev., vol. 1, 214. This court has decided that that the allegation of the precise time, even in criminal cases, is not essential, unless in a few cases; *Gebhart* v. *Adams*, 23 Ill. 399. The presentment avers, as to time, "at divers times during the two years last past," and "at divers times during the six months last past." It was insisted, in the argument that, as no precise day is named, therefore the accused cannot meet the charge without summoning a large number of witnesses. He would not be aided by the averment of a particular day. If the presentment had charged the commission of the offence on a certain day, in the month of June, A. D. 1867, the prosecution would not, by any rule of law, have been limited to the day named, but might have proved the offence—the omission—on any day between the day named and the date of the presentment. The statute of limitation would not apply; for the canon has not so provided. The highest judicature in this church has decided that there is no such law governing church trials. Bishop Onderdonk was found guilty of immorality and impurity, committed seven years prior to his trial; and the Bishops of Louisiana, Rhode Island, Delaware and Arkansas, in their opinion, declared that there was no limitation to

the inquiry by a church court as to offences, because none had been fixed and recognised by the canons.

It is inconceivable that the accused could have been surprised by any vagueness or uncertainty in the charges and specifications. It is a reasonable presumption that a minister has knowledge of the constitution of his church and of his acts as such minister of a public character, and within a recent period, and particularly his conduct and omissions in the administration of the sacraments of his church. The bill contains a virtual admission of such knowledge. The gravamen in the presentment is the omission of the words "regenerate" and "regeneration" in the ministration of the sacrament of infant baptism. The bill has no positive negation of the omission, but merely avers "that your orator does not believe himself to have been guilty of offence and misconduct, rendering him liable to trial." The fair construction of this averment is, "I am guilty of the omission, but this is no offence which renders me liable to trial." In his affidavit, in support of the bill, the accused said he had informed the bishop that "he had conscientious scruples in regard to the positive averment of the regeneration of the baptized infant, by virtue of the act of baptism only." He further stated, "but this affiant utterly denies that the omission of the word 'regenerate' from some part of the said office for infant baptism would constitute any offence under the canons," &c.

The inference is irresistible that he was informed of the nature and cause of the accusation against him.

The third objection raises the right of challenge; and it is insisted that this right inheres in every citizen; that the common law and common justice give it. This is true in trials in all courts organized under the constitution and laws of the land. This spiritual court was not thus created. It is the creature of the canons of the church, and by them must be governed, and by them be judged. Why should we force upon this church judicatory our system without the asking and against its consent?

The canons must control. Section 3 of canon 20 authorizes the formation of an ecclesiastical tribunal, and directs that the bishop shall furnish a list of eight presbyters to the accused, and he shall select not less than three nor more than five from this list, who shall constitute the court. But if he neglect or refuse to make a selection the standing committee shall select for

him. This is the mode adopted, and by implication, excludes all other modes. Eight persons are presented; three or five might be rejected without cause, and to this extent a peremptory challenge is allowed.

The minister, in a legal point of view, is a voluntary member of the association to which he belongs. The position is not forced upon him; he seeks it. He accepts it with all its burdens and consequences; with all the rules, and laws, and canons then subsisting, or to be made by competent authority; and can, at pleasure, and with impunity abandon it. If they were merciful and regardful of conscientious scruples, he knew it; if they were arbitrary, illiberal, and attempted to chain the thoughts and consciences, he knew it. They cannot, in any event, endanger his life or liberty; impair any of his personal rights; deprive him of property acquired under the laws; or interfere with the free exercise and enjoyment of religious profession and worship—for these are protected by the constitution and laws. While a member of the association, however, and having a full share in all the benefits resulting therefrom, he should adhere to its discipline; conform to its doctrines and mode of worship; and obey its laws and canons. If reason and conscience will not permit, the connection should be severed. "The only remedy which the member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it:" *Forbes* v. *Eden*, Law Rep. 1 S. & D. App. 568.

If we compel this spiritual court to observe the rule of law as to challenge of jurors, it would be our duty to enforce the observance of all the rules of law, unless of impossible application. With the same propriety it might be urged that twelve presbyters—the number of a jury—instead of three or five, should form the court. Why not go beyond the pale of the church, and abandon the presbyters as wholly incompetent? The canon in the designation of presbyters as assessors, and the number is no more emphatic than in providing the manner of selection. What law shall govern as to the number of witnesses necessary to establish an offence? Our law only requires one witness, with two exceptions; the scriptural rule requires two. The injunction of St. Paul is, "Against an elder receive not an accusation, but before two or three witnesses." The law under the old dispensation was: "One witness shall not rise up against

a man for any iniquity, or for any sin; at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established."

We have no right, and, therefore, will not exercise the power to dictate ecclesiastical law. We do not aspire to become *de facto* heads of the church, and by construction or otherwise, abrogate its laws and canons. We shall not inquire whether the alleged omission is any offence. This is a question of ecclesiastical cognisance. This is no forum for such adjudication. The church should guard its own fold; enact and construe its own laws; enforce its own discipline; and thus will be maintained the boundary between the temporal and spiritual power.

As to the fourth objection, that the notice for trial was insufficient, we have only to say, this comes too late. The party was present, and made no pretence that he had not had time to prepare for trial. As an allegation in the bill it is too frivolous to be considered.

But it is said that the civil rights of the Rev. Mr. Cheney are involved in this controversy; that the office of a clergyman is one of public concern; that he has *vested* rights in it; that the right to preach is in itself property, and that attached to the office in question are salary and emoluments. Has the party in this case any vested right to the rectorship of Christ Church, and as a necessary consequence to the profits and perquisites? No parish can form a part of the diocese of Illinois, unless with the consent of the bishop and the formation of a constitution, as provided in canon eight, by which it "accedes to, recognises and adopts the constitution, canons, doctrines, discipline and worship of the Protestant Episcopal Church." The minister, having been previously ordained, and pledged to conformity to the rules and doctrines of the church, is installed as rector, according to canon ten, by the production of the proper certificates from the bishop. The vestry is required, by canon twelve, to obtain the amount stipulated for his support by "the gathering of offering in divine service, or by the procurement and collection of subscriptions, or of pew rents." It would be a mockery of language to say the agreement for a salary, thus made, constituted a vested right—a right which could not be suspended. The salary depended upon the continued performance of the duties of rector. The contract must be construed and enforced by reference to the canons which form a part of it.

If the minister was suspended or deposed for any ecclesiastical offence, the payment would cease. The case of the *Dutch Church of Albany* v. *Bradford*, 8 Cowen 457, confirms this view. An action was brought by the minister to recover a portion of his salary. He had been only suspended, and insisted that his salary continued until the dissolution of the connection. In the Court of Errors, on a reversal of the decision of the Supreme Court, it was held that he was not entitled to his salary between the sentence of suspension and dissolution; and that as he did not, and could not, perform his ministerial duties, he could not recover his salary. The record in the case at bar discloses no contract which we can construe, except by reference to the canons.

It is also claimed, that there is value in the right to pursue any lawful avocation. Of this we entertain no doubt. We have no doubt, either, of the absolute right of every citizen, under our constitution, to teach and preach the gospel to whomsoever will listen. But in an organized church, with written or printed rules and established doctrines and mode of worship, the right is qualified. The continuance, powers and emoluments of the position depend upon the will of the church. The right is contingent and restricted, and as a thing of value is very much lessened. The sentence of a church judicatory, in a proper case, deprives of the position, and salary and emoluments are gone. In this unhappy controversy is involved a grave question, and of deeper moment to all Christian men—indeed to all men who believe that Christianity, pure and simple, is the fairest system of morals, the firmest prop to our government, the chiefest reliance in this life, and the life to come. Shall we maintain the boundary between church and state, and let each revolve in its respective sphere, the one undisturbed by the other? All history warns not to rouse the passion or wake up the fanaticism which may grapple with the state in a deathly struggle for supremacy.

Our constitution provides that the "free exercise and enjoyment of religious professions, and worship, without discrimination, shall for ever be guaranteed." In ecclesiastical law, profession means the act of entering into a religious order. Religious worship consists in the performance of all the external acts and the observance of all ordinances and ceremonies, which are engaged in with the sole and avowed object of honoring God. The constitution intended to guarantee from all interference by the state, not only

each man's religious faith, but his membership in the church, and the rights and discipline which might be adopted. The only exception to uncontrolled liberty is, that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the state shall not be justified. Freedom of religious profession and worship cannot be maintained if the civil courts trench upon the domains of the church—construe its canons and rules—dictate its discipline and regulate its trials. The larger portion of the Christian world has always recognised the truth of the declaration: "A church without discipline must become, if not already, a church without religion." It is as much a delusion to confer religious liberty without the right to make and enforce rules and canons, as to create government with no power to punish offenders. The constitution guarantees the free "exercise and enjoyment." This implies not alone the practice but the "possession with satisfaction"—not alone the exercise, but the exercise coupled with enjoyment. This "free exercise and enjoyment" must be as each man and each voluntary association of men may determine. The civil power may contribute to the protection, but cannot interfere to destroy or fritter away.

The civil courts will interfere with churches, or religious associations, when rights of property or civil rights are involved. But they will not revise the decisions of such associations upon ecclesiastical matters, merely to ascertain their jurisdiction. As we understand the position of the defendant in error, his civil rights are not so endangered as to require our interposition. It may not be improper to collate some of the authorities which bear upon this question. The controlling principle is declared in the 24th statutes of Henry VIII.: "Causes spiritual must be judged by judges of the spirituality, and causes temporal by temporal judges." In *Baptist Church* v. *Witherell*, 3 Paige 296, the chancellor said: "Over the church, as such, the legal tribunals do not profess to have any jurisdiction whatever, except to protect the civil rights of others and preserve the public peace. All questions relating to the faith and practice of the church, and its members, belong to the church judicatories to which they have voluntarily subjected themselves. In *Lawyer* v. *Cipperly*, 7 Paige 281, it is said: "the church, as to its doctrines, government and worship, is to be governed by its peculiar rulers." In the case of *Gable* v. *Miller*, 10 Paige 627, the learned chancellor

doubted the soundness of his former decision, but his decree was reversed by the highest court in the state, by a vote of fourteen to three. *Miller* v. *Gable*, 2 Denio 492. The same principle is enunciated in *Robertson* v. *Bullions*, 9 Barb. 64; and *Diffendorf* v. *Ref. Cal. Church*, 20 John. 12. In the case of the *German Ref. Church* v. *Seibert*, 3 Barr 291, it is said: "The decisions of ecclesiastical courts are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church." The Court of Appeals of Kentucky, in *Shannon* v. *Frost*, 3 B. Monroe 258, says: "This court, having no ecclesiastical jurisdiction, cannot revise ordinary acts of church discipline or excision."

In a recent case *Forbes* v. *Eden*, Law Rep. 1 Scotch & Div. Appeals 568, decided in 1867, the Rev. Mr. Forbes alleged that he could not, conscientiously, obey certain canons; and that, as a consequence, he might be degraded from his office of minister, and be deprived of temporal advantages. The Ld. Chancellor said: "Appellant does not allege any actual damage, * * * but founds his action upon a possibility of damage hereafter," and that, "it was a mere abstract question involving religious dogmas, and resulting in no civil consequences which would justify the interposition of a civil court." Lord CRANWORTH said: "There is no authority in the courts to take cognisance of the rules of a voluntary society * * * * * save only so far as it may be necessary for the due disposal and administration of property." Lord COLONSAY said: "A court of law will not interfere with the rules of a voluntary association, unless it is necessary to do so to protect some civil right." In *Garten* v. *Penick*, in the Court of Appeals of Kentucky, 9 Am. Law Reg. 210, Judge ROBERTSON, who delivered the opinion of the court, said: "Christianity, though an essential element of conservatism, and a great moral power in the state, should only work by love, and inscribe the laws of liberty and light on the heart; and the civil government has no just or lawful power over the conscience, or faith, or form of worship, or church creeds, or discipline, as long as their fruits neither unhinge civil supremacy, demoralize society, nor disturb its peace or security." In reference to church members he said: "They joined the church with a knowledge of its defined powers, and, as the civil power cannot interfere in matters of conscience,

of faith, or discipline, they must submit to rebuke or excommunication, however unjust, by their adopted spiritual rulers."

In the only case in this court in which this question has been adverted to, the court says: "Whilst we will decide nothing affecting the ecclesiastical right of a church, which we are not competent to do, its civil rights to property are subjects for our examination, to be determined in conformity to the laws of the land, and the principles of equity;" *Ferrari* v. *Vasconcelles*, 36 Ill. 46.

There are some authorities in favor of interference, but the cases collated declare the law as we think it ought to be. We have been referred to numerous cases in Massachusetts. The constitution of that state, from 1780 to 1833, made it the duty of the legislature to "require the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public protestant teachers of piety, religion, and morality, in all cases where such provisions shall not be made voluntarily:" Constitution of Massachusetts, part 1, art. 3. Laws were passed for the purpose contemplated, and an ecclesiastical law has thus grown up there. These decisions are not applicable in this state, as legislative and judicial interference in such matters is expressly forbidden by the constitution, which all are bound to obey.

This case may then be briefly summed up: A rector in the church is charged with non-conformity to its doctrines—intentional omissions in the ministration of its ordinances; and the attempt is made to organize a court, composed of his brother clergymen, for his trial. He appeals to the civil court, and alleges, as the chief reason for interposition, the want of authority in the spiritual court to try him, and a misconstruction of the canons. The same point was made to that court, and its power denied. It was urged with the same earnestness, and enforced with the same arguments there as here. That court overruled the objections and decided that it had jurisdiction. Five intelligent clergymen in the church, presumed to be deeply versed in biblical and canonical lore, were more competent than this court to decide the peculiar questions raised; why should we review that and not every other decision which involves the interpretation of the canons? It is conceded that when jurisdiction attaches, the judg-

ment of the church court is conclusive as to purely ecclesiastical offences. It should be equally conclusive upon doubtful and technical questions, involving a criticism of the canons, even though they might comprise jurisdictional facts. It requires no more intellect, information or honesty to decide what is an ecclesiastical offence than to determine the authority of the court according to the canons. The distinction is without a difference.

Civil courts have duties and responsibilities devolved upon them, and a well-defined jurisdiction to maintain. The church has more solemn duties, more weighty responsibilities, and an authority granted by the Infinite Author of all things. We shall not enter in and "light up her temple from unhallowed fire." The ministers selected to sit in judgment on the acts of a brother ought to be impartial and competent, prompted, as they doubtless are, by the teachings of divine revelation, and the kindly influences of Christian charity, which suffereth long and is kind; beareth all things, believeth all things, hopeth all things, endureth all things.

Having given this case a most careful consideration, our deliberate judgment is that the ecclesiastical court ought not to be restrained by the mandate of this court.

The decree of the Superior Court is reversed, and the bill dismissed.

LAWRENCE, C. J., and SHELDON, J.—We concur in the decision of the case at bar announced in the foregoing opinion, and we also concur in the opinion itself, except as to one principle therein. We understand the opinion as implying that, in the administration of ecclesiastical discipline, and where there is no other right of property involved than the loss of the clerical office or salary as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, under the laws or canons of the religious association to which it belongs, and its decision of that question is binding upon secular courts. This is a principle of so grave a character that, believing it to be erroneous, we are constrained to express our dissent upon the record.

We concede that when a spiritual court has once been organized in conformity with the rules of the denomination of which it forms a part, and when it has jurisdiction of the parties and

the subject-matter, its subsequent action in the administration of spiritual discipline will not be revised by the secular courts.

The simple reason is that the association is purely voluntary, and when a person joins it, he consents that for all spiritual offences, he will be tried by a tribunal organized in conformity with the laws of the society. But he has not consented that he will be tried by one not so organized; and when a clergyman is in danger of being degraded from his office, and losing his salary and means of livelihood, by the action of a spiritual court unlawfully constituted, we are very clearly of opinion he may come to the secular courts for protection. It would be the duty of such courts to examine the question of jurisdiction, without regard to the decision of the spiritual court itself; and if they find such tribunal has been organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. We consider this position clearly sustainable upon principles and authority.

The foregoing opinion, so far as the merits of Mr. Cheney's bill are concerned, seems to be entirely satisfactory and conclusive. It would scarcely seem possible that he could himself have expected to succeed, except upon the ground that all which was charged against him, and the commission of which he virtually concedes, constituted no offence upon a fair construction of the canons of his church. This conclusion he may have reached, no doubt, by resort to first principles, and thus virtually reasoning from a standpoint outside of the church of which he was acting as an accredited minister. And this is the fundamental fallacy upon which all this class of men seem to argue:—If a thing is, in itself, reasonable and just, that one is at liberty to do it, although prohibited by the very letter of the law to which he has promised obedience. This is the essence, and the absurdity, of what has been called "the higher law." It is virtually setting up one's own will and judgment, under the sobriquet of conscience, against the plain letter of the written law. That this was really Mr. Cheney's case there would seem to be no other proof needed, than a brief recurrence to the frivolous character of the other alleged irregularities in the organization and procedure of the ecclesiastical court, which must have been introduced as a mere setting for this real gravamen of his case. 1st. He complains that the commission of the Bishop to the Presenters was irregular and therefore void, and chiefly because it recited a ground of the bishop's information in regard to the offence of Mr. Cheney, not named in the canons. There was no necessity of any commission; none was required by the canons. All that was required was, that presenters should be in some way designated by the bishop, to examine the reputed offence, and, if well founded, present it for trial. The offender was in no way implicated or entitled to be consulted until after presentment. This objection, therefore, was analogous to a motion in

a criminal court to quash an indictment upon the ground of some defect or informality in the venire for the grand jury. And the other alleged irregularities are scarcely more deserving of serious consideration. No fair-minded man can possibly believe the omission of time and place in the charge of such an offence in an ecclesiastical court could be held fatal to the presentment. If required in a formal indictment in offences consisting of mere omissions, it is the merest form, affording no security, or information, to the accused whatever, since the offence may always be proved to have been committed on any other day, within the Statute of Limitations, and at any other place within the body of the county. And the other objections seem mostly of the same futile and frivolous character. It seems scarcely credible that Mr. Cheney, or any one else, could seriously pretend to believe in the same right of challenge of his triers, in an ecclesiastical court, which he would have in a secular court of criminal jurisdiction. We think this is the first case where any such extensive application of the principles of Magna Charta, or the Petition, or Bill of Rights, has ever been claimed. The claim that notice of the trial was insufficient and that the whole proceeding should be declared void on that account, after the accused had appeared and submitted his exceptions to the court, is very properly declared by the court "too frivolous to be considered." This disposes of all grounds upon which the injunction is attempted to be maintained, except that the facts charged constituted no offence. This, we have no doubt, both Mr. Cheney and his friends and supporters, sincerely and religiously believed; and if the bill had been based upon this sole ground, it could not have failed to excite deep sympathy on his behalf in all liberal and earnest minds; a sentiment which sooner or later cannot but penetrate the double mail of old centuries Ritualism in this country and everywhere. We say this with all respect and veneration for the Church of England and the American branch of it, to which no man renders a more willing or ardent devotion than ourselves.

But will this change the law and justify the civil courts in usurping the jurisdiction of the ecclesiastical tribunals throughout the land? If so, the church in America is subjected to an arbitrary and irresponsible oppression and tyranny at the hands of the state, which exists nowhere in Europe, either among Protestants or Romanists. For in all those countries ecclesiastical causes are tried, in the main, by ecclesiastical judges, and the decisions respected by the secular courts. There indeed is in England a prerogative supervision over all the judicial tribunals in the kingdom exercised by the Court of Queen's Bench. But this supervision only extends to actions through such writs as Prohibition, or Procedendo, and Mandamus in some instances; none of which assume to control the action of any inferior court, temporal or spiritual, within their appropriate jurisdiction, but only to keep them within such jurisdiction, and secure the proper action in the proper time. And that was really the remedy which Mr. Cheney's case seemed to require, provided there was no case against him. But no English Court of Chancery would ever presume to issue an injunction against the members of an ecclesiastical court, any more than they would presume to direct Parliament or the Crown in the performance of their duty. But, very naturally, Mr. Cheney supposed he ought to have some mode of trying the validity of the proceedings against him, before some civil tribunal, and not be left entirely at the mercy of an ecclesiastical court, which is proverbially influenced more by prejudice and passion than any other species of

judicial tribunal. This is not, of course, attributable to any want of good principle or wisdom in the judges, so much as to the controversial and partisan nature of the causes, and the want of judicial training and experience among the members of such courts—many of whom never act as judges in any court more than once in their lives. And we are free to say that we believe Mr. Cheney is right in his contention that he has rights of property involved in this controversy, which cannot finally be disposed of by the decree of the ecclesiastical court without some power of revision by the secular tribunals. But it seems to us that he resorted to an altogether inadequate and unsuitable remedy. The writ of injunction out of chancery is never applied to the control of the action or jurisdiction of other courts, but only to the action of the parties in a controversy. And there is no occasion and no propriety in a resort to this remedy except to save some irreparable mischief. But in Mr. Cheney's case, if his contention is well founded, that he has committed no offence against the laws of the church, he is in no peril; and if he is guilty, the sooner he is convicted the better. His conviction by the ecclesiastical court of what is no offence, even if it be declared an offence by that court, will not make it so, provided the facts charged do not constitute an offence, or if the court have no jurisdiction, either of the offence or the party, or if the proceedings are not in conformity with the requirements of the ecclesiastical law. But these questions cannot be determined by any secular court, in advance of the decision of the ecclesiastical court. For it cannot be known how they will proceed and what they will decide, until the procedure is accomplished and the decision made. The fact that the ecclesiastical court is proceeding irregularly at a particular time is no ground of certain inference that it will continue in the same course to the end, and then enter a wrongful judgment. But if all this does occur no irreparable mischief is inflicted. The ecclesiastical court possesses none of the prerogatives of a civil court. No verity attaches to its decrees or records as evidence. They must all be proved by testimony *ore tenus* in a civil court, and are liable to contradiction and explanation the same as the award of a committee of a voluntary society, or of arbitrators chosen by the parties. We are all liable to misconception and misapprehension in regard to the functions of ecclesiastical tribunals in this country, from the fact that they are called "courts," and the supposed analogy existing between such courts and the English ecclesiastical courts. But, in fact, an ecclesiastical court in this country has no status, as a court, except what is conferred by the consent of the members of the church or association, and as to them alone. It is the same as any other voluntary society or organization whatever, of which the civil courts will assume no control, and of whose decrees they will take no cognisance, except as they are relied upon by the parties to civil controversies, in establishing their rights in the secular courts.

It need scarcely be said that no court of equity would ever listen to an application to enjoin the proceedings of arbitrators, or of a committee of a voluntary society, on the ground that they were proceeding irregularly and without authority, or with unfairness and partiality. It will be time enough to raise these questions after the final action of such bodies is reached, in attempting to enforce their awards.

This seems to have been all that was legitimately involved in Mr. Cheney's bill, and the Supreme Court might have decided the case upon this narrow view, that the proceeding was premature, and afforded no ground for an injunction out

of chancery. But the great interest felt in the controversy, and the extended arguments of counsel in the case, naturally led to the attempt, on the part of the court, to establish some general rules of law, which might control future cases, and this case in particular. In this attempt, if we comprehend the views of the majority of the court, it does not seem to us they have been equally fortunate as in the other portions of the opinion; and we are confirmed in this view from hearing the general complaint of the difficulties of others in regard to the same subject, and especially of the dissenting members of the court. The judges were all agreed that the bill for an injunction could not be maintained; and to this extent the opinion is lucid and able and entirely satisfactory. But beyond this it can scarcely be regarded as putting forth views likely to be deferred to as authority even in that state, and certainly not elsewhere. And it seems to us that in two or three important particulars it puts forth views which can scarcely be maintained anywhere.

1. That Mr. Cheney has no pecuniary interest at stake in the matter; nothing which may fairly be regarded as property which the civil courts will protect. It seems to us, that in every view Mr. Cheney has a very important and valuable interest at issue in this very controversy, and one that the civil courts will protect, in all proper modes, but certainly not by way of injunction out of chancery. If Mr. Cheney is suspended from exercising the functions of his ministry and he chooses to institute civil proceedings for the recovery of his salary or any other valuable right affected by such decree of suspension, and that decree is interposed by way of defence, the civil court will, as we understand the law, examine the entire proceeding, from beginning to end, the same as if an award of arbitrators were relied upon, as having terminated his relation of rector of the church. And in that view, before the parties, relying upon the decree of the ecclesiastical court, can derive any benefit from it, by way of defence, it must appear that the court was organized in conformity with the laws of the church; that it had, according to the laws of that body, jurisdiction both of the subject-matter of the offence and of the person of the accused, and that the procedure and final decree were also substantially in conformity to those laws.

2. We must therefore conclude that the question of the jurisdiction of the ecclesiastical court, both of the subject-matter of the controversy and of the person of the party, is always open; and that the decision of that court in regard to either of these questions is not conclusive. This question is so clearly settled, both upon principle and authority, that it scarcely seems requisite to examine it much in detail. There can be no question, we apprehend, that an ecclesiastical court must be considered one of special and limited jurisdiction. Few courts are more so. But it is too well settled to admit of debate or to require the citation of authority, that nothing will be presumed in favor of the jurisdiction of any court of the class just named. If such a court be a domestic one, whose judgments can only appear by its record, the jurisdiction of the court, both in regard to the subject-matter and the parties, must appear upon the record. And unless it do so appear the judgment cannot be upheld.

But we suppose it must further be conceded in regard to ecclesiastical courts, in this country, that they must, as to the civil tribunals of the state or nation, stand upon the same basis as foreign courts. No verity attaches to the records of any such court. There is no mode in which such record can be made evidence unless by special statute. Such courts are not courts of record so as

to enable them to authenticate their judgments or decrees by way of record. The whole proceedings of the court are matters resting *in pais*, so that everything necessary to give validity to the judgment must be shown by oral proof. And being a court of special and limited jurisdiction and foreign to the recognised judicial tribunals of the country, it must be shown that the court was properly constituted under the canons. We do not mean by this that every minute and technical formality must be strictly and literally complied with in the constituting of the court, but only in substance. For instance, if the canon required three presenters, two will not be able to act. And so of the selection of the assessors, one or two or four could not act when three or five are required. It must also be affirmatively shown that the court had jurisdiction, both of the subject-matter and of the parties, which is but an extension of the requirement that the court be properly constituted under the canons. It must also appear that the trial was *bonâ fide;* exempt from fraud or partiality; and substantially in conformity with the canons.

This is now entirely well settled by the English decisions as to foreign judgments, and must clearly apply to ecclesiastical courts in this country. In *Bank of Australia* v. *Nias*, 16 Q. B. 717, it is decided, on full consideration, that a foreign or colonial judgment is impeachable, by showing want of jurisdiction, or that the party was not served with process, or that the same was unfairly or fraudulently obtained. And substantially the same is held in *Ricardo* v. *Garcias*, 12 Cl. & Fin. 368. Other cases might be cited, but they will be found digested in 2 Story Eq. Ju. §§ 15, 76, *et seq.;* Story Confl. Laws, §§ 618 a–618 k. But such judgments are conclusive upon the merits, when not impeached for any of the reasons alluded to, as much so as a domestic judgment. And we apprehend the same rules will apply to the judgments of ecclesiastical courts in this country. After showing that they are properly constituted, and have full jurisdiction, and proceed regularly and fairly in the trial, it would certainly not be competent for a civil court to declare that the evidence was insufficient or the finding erroneous or the construction of the canons misconceived. But if important and competent evidence on the part of the accused were rejected, or possibly if an absurd construction of the canons adopted, or any other unjust and partial course pursued to bring about the conviction, it could not be upheld. We suppose, too, that if the ecclesiastical court should attempt to pursue the rules of the common law, or of the canon law, either in regard to the admission of evidence or the construction of the canons or the definition of the offence charged, and in such attempt should misconceive the law which they attempted to pursue, and thus be led to a different result from what they would otherwise have reached, this would render any judgment they might give, under such misapprehension, of no force or validity. That is a well-settled rule, as to the award of referees and arbitrators, and we see no reason why it does not apply, with equal force, to the decrees of these voluntary and friendly societies, when they attempt to create courts for the settlement of disputes or the enforcement of discipline among their members. But we may naturally suppose that the secular courts will be backward in disregarding the action of the ecclesiastical courts, in matters of ecclesiastical cognisance, mainly upon the ground of misconception of the law.

We cannot forbear to say, in conclusion, that it seems to us the civil law allows Mr. Cheney a wide range for impeaching the decree of the ecclesias-

tical court, in this case, if it should finally be rendered against him, as he seems to apprehend, possibly not without reason. But if he has come to feel so little respect for the ritual of his church, as his course seems to indicate, he will suffer the less deprivation in leaving it, and attempting to do his work outside, which would seem to be the only safe and proper place for one entertaining his views.

The subject is very learnedly discussed and the authorities very extensively quoted by HAND, J., in *Robertson* v. *Bullions*, 9 Barb. 64, in an opinion extending over more than fifty pages. The principle of the decision is expressed in the head-note thus: The civil courts cannot, upon the merits, overhaul the decisions of ecclesiastical judicatories, in matters properly within their province. See also *Baptist Church* v. *Witherell*, 3 Paige 296; *Gable* v. *Miller*, 10 Id. 627; s. c., 2 Denio 492.

The Supreme Court of New York, in *The People* v. *Steele*, 2 Barb. Sup. Ct. Rep. 397, on the authority mainly of *Rex* v. *Barker*, 3 Burrows 1265, put out one minister and put another into the possession of the church and parsonage, where the church authority had so decreed. But that case has been questioned in the case of *Robertson* v. *Bullions*, *supra*, citing *The People* v. *Stevens*, 5 Hill 616. *Robertson* v. *Bullions* was a proceeding in equity, and both courts held that the temporalties of the church could not be applied to the support of a minister who had been suspended from the exercise of his ministry by the church authorities.

The subject is very learnedly discussed in *Watson* v. *Avery*, 2 Bush 332–398, and this case fully sustains the views we have presented in this note. The conclusive effect of church authority within its sphere is fully recognised in *Sutter* v. *Dutch Reformed Church*, 42 Penna. St. 503. In *German Reformed Church* v. *Seibert*, 3 Id. 282, the court held, that the decisions of ecclesiastical courts, like those of every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Until a final adjudication is had in the church judicatories the relator is without remedy by mandamus. Id. In *Smith* v. *Nelson*, 18 Vt. 511, Chief Justice WILLIAMS gave a very able and learned opinion in favor of the view, that the decisions of church judicatories in that state are not to be regarded as of any particular weight, in determining the pecuniary rights of parties in the secular courts, any further than their wisdom and justice commend them to acceptance by those tribunals. We greatly fear, that tried by this test, few of them would meet with much favor. For, so far as we remember, in this country, the most important ecclesiastical trials, like trials for impeachment of civil officers, have been characterized by great want of impartial justice and fair dealing, and deeply imbued with a spirit of bitterness and malevolence. It is natural they should be so, since they are commonly stimulated by one party in the church against another, and have more reference to success than either mercy or justice. We have discussed these questions somewhat in detail, ante, vol. 9, N. S. 220–225. I. F. R.

The opinion of the majority of the court seems to enunciate a rule probably never heretofore laid down, that the decisions of ecclesiastical judicatories or of those claiming to be such, are not only conclusive when jurisdiction attaches, but equally so as to the existence and extent of jurisdiction. It is indeed declared, that the distinction between the assumption of jurisdiction and the

conclusiveness of action when jurisdiction has obtained, is a distinction without a difference. We believe it has been generally supposed, that when the act of any authority whatever is pleaded before a civil court, as the basis of a civil right, the court may inquire and determine as to the *jurisdiction* of that authority, the action of which is thus brought under review.

I. 1. If the conclusion announced in the principal case be correct, it is difficult to see why it would not control in questions of church property, for though such questions might arise between those not parties to the immediate acts of discipline, yet acquiescence in or disobedience to such acts, may readily enough furnish the very ground of controversy.

But it is no longer an open question that civil tribunals will interfere "when rights of property or civil rights are involved." And civil tribunals, as is well remarked by Mr. Innes in his valuable treatise on the "Law of Creeds in Scotland" (p. 323), "have no means of doing justice, except by investigating into the differences of doctrine, *discipline*, or practice—which to the litigants may be religious differences, but to the judge are mere matters of fact bearing upon a question of civil right."

But upon what principle can the unbroken line of authority to this effect, be sustained, if there be no difference between the finality of a finding on jurisdictional facts and upon the merits?

2. Non-established churches are merely voluntary associations founded on contract. Their constitutions, canons, rules and regulations are the stipulations between the parties. Tribunals may be established by agreement, for the enforcement of discipline, but they are limited by the terms of such agreement and must proceed as therein specified, and substantially in accordance with the law of the land and the principles of justice. They have no "jurisdiction," properly speaking, for that implies the existence of a power conferred by the state and vested in functionaries sanctioned for that purpose by the state, but that which for convenience may be so termed, entirely dependent upon the contract, and which never precludes the fullest investigation by the civil courts in a proper case, arising upon the action of such voluntary tribunals, and the administration of such relief as upon the facts appears appropriate and necessary.

These are the views expressed in *Long* v. *The Bishop of Capetown*, 1 Moore Priv. C. C. (N. S.) 411, 461, in which it is held that the decisions of such tribunals will only be binding, when they have acted *within the scope* of their authority, and have proceeded in a manner consonant with the principles of justice, including "that strict impartiality, *necessary* to be observed by all tribunals, however little fettered by forms."

And to the same purport is the elaborate opinion of Ld. Romilly in *Bishop of Natal* v. *Gladstone*, L. R. 3 Eq. 1 (1866), his lordship deciding that the action of a colonial bishop when in excess of his authority, or not consonant with the principles of justice, must be held void. So in *McMillan* v. *The Free Church of Scotland*, 22 Court Sessions (N. S.) 290, the court say: "But whatsoever contract they may form, certainly no more than any other contracting parties, whether an association or individuals, will they be able to exclude the ordinary civil jurisdiction of this court to decide between the members: 1st. Whether such contract does really exist or not? 2d. What is the true measure and meaning of that contract? And 3d. What is the construction and interpretation to be put on any one or more of its particular clauses and provisions about which the members of the body are at variance?" And it is held that as to whatever is beyond the stipulated action of

the contract, the court will undoubtedly maintain its jurisdiction. And in the second judgment in the same case (23 Ct. Sess. (N. S.) 1314), it is declared that the court will interfere where churches are proceeding in violation of their own constitutions and "their sentences are pronounced by those who are *not* judicatories to that effect." See also *Murray* v. *Burgers*, 4 Moore's P. C. C. (N. S.) 250; *In re Lord Bishop of Natal*, 3 Id. 115; *Dunbar* v. *Skinner*, 11 Court Sess. (N. S.) 945.

These cases, not arising in the "Established Church," will be found applicable to those in this country. Indeed, in the first Auchterarder case, which involved the proceedings of a Scottish presbytery and other governing bodies in the Presbyterian Church, the broad principle is stated by Lord BROUGHAM, that "when *any* proceeding of a church court, however *strictly* ecclesiastical in its own nature, affects *a civil right*, that proceeding in *its whole extent*, falls under the cognisance of the courts of law:" *Presb. of Auch.* v. *Kinnoull*, 6 Clark & F. 646; *Ferguson* v. *Kinnoull*, 9 Id. 251. To the same effect substantially is *Forbes* v. *Eden*, L. R. 1 Sc. & D. App. 568, in which, however, neither actual damage nor the impending danger of any, was alleged: see s. c. 4 Ct. Sess. (3d Series) 157.

Similar conclusions have been reached in this country. It has been uniformly held that the judgments of ecclesiastical organizations are only binding when arrived at in accordance with the rules and regulations of the particular church, and conducted regularly, *bonâ fide*, and with impartiality. To hold otherwise would be to yield to tribunals uncreated by law, the supremacy over those to whom the administration of law is committed. It would be, in the language of the Supreme Court of Kentucky, to subject all individual and property rights confided in or dedicated to the use of religious organizations, to the *arbitrary will* of those who may constitute their judicatories, without regard to any of the regulations or constitutional restraints by which it was intended such rights should be protected: *Watson* v. *Avery*, 2 Bush 336. In *Smith* v. *Nelson*, 18 Vt. 511, it is said that "the proceedings of any self-constituted ecclesiastical tribunal, not recognised as a part of our jurisprudence, may be examined, disregarded, and declared void, whenever the subject comes before our courts of law, whether directly or collaterally."

The Supreme Court of Pennsylvania in *Commonwealth* v. *Green*, 4 Whart. 603, in reviewing the proceedings of the Presbyterian General Assembly says: "We have, as already remarked, no authority to adjudge its judgments on their merits. We are to determine only what was done; the reasons of those who did it, are immaterial. If the acts complained of were within the *jurisdiction* of the Assembly, their decision must be final, though they decided wrong." And again: "Had the excluded synods been cut off by a judicial sentence, *without hearing or notice*, the act would have been contrary to the cardinal principles of natural justice, and consequently void." And the same court in *Green* v. *African Meth. Epis. Church*, 1 S. & R. 254, restored the relator to his "standing" as a member, overruling the action of the society in that regard.

So in *Runkle* v. *Winemuller*, 4 Har. & McHen. 429, the relator was restored to his "place and function" as a minister of the German Reformed Church, upon able argument (*Pinkney* for the writ; *Harper contrà*) against the interference of the court. See also *Brosius* v. *Reuter*, 1 H. & J. 551; *Thompson* v. *Reh. Cong. Soc.*, 7 Pick. 160; Boston Law Rep. Dec. 1855, 427, and cases cited. *Shannon* v. *Frost*, 3 B. Monroe 257, frequently cited to sustain the opposite position, is not adverse, as the case arose

in a Baptist church, which had no constitution and acknowledged no ecclesiastical authority, the voice of the majority of the congregation being of necessity the voice of the church. So *Seibert's Case*, 3 Barr 291, turned upon the fact that the suitor had not exercised the right of appeal, the court holding that it was time enough to invoke their aid, when he had exhausted the remedies secured to him by the law of the church.

This subject received an examination by that distinguished commentator Judge REDFIELD, in a note to *Gartin* v. *Pennick*, 9 Am. Law Reg. 210; and he, though dissenting from the conclusion of the court below in the principal case, nevertheless arrives at practically the same result as that above stated. He says that "it is like the case of a reference or arbitration. The submission, whether immediate or remote, whether by a contract for the express purpose or by a contract of membership, is all the same, but in some way it must be proved." And again, the action of churches must be treated, when "*according to their own constitutions and canons*, as binding the members, so long as the proceedings are regular and *bonâ fide*. If not, they will not, of course, bind any one, and whether they have been so, is always open to inquiry, as matter of evidence *in pais*, the same as in regard to an arbitration or a foreign judgment."

It is well established that awards will be set aside when *ultra vires: Strong* v. *Strong*, 9 Cush. 560, 34 Vermont 121; for misbehavior, *Speer* v. *Bidwell*, 44 Pa. 26; for prejudgment, *Taber* v. *Jenny*, 1 Sprague 320; and for partiality, however honest in intention, *Sullivan* v. *Frink*, 3 Clarke (Iowa) 66; *Strong* v. *Strong*, 12 Cushing 135, *Same* v. *Same*, 9 Id. 560.

Careful research fails to disclose a single authority in this country to sustain the position that civil courts are precluded from action by the conclusive character of ecclesiastical determinations. And throughout the British Empire the correctness of the language of Lord CAMPBELL in the second Auchterarder case, is universally conceded, that "from the time of St. Thomas A'Becket till now, there has been no such pretension in any part of this island as that ecclesiastics, in the exercise of a *liberum arbitrium* inherent in them, are of their own authority, *conclusively* to define and declare their own power and jurisdiction, and that no civil tribunal can call in question the validity of the acts or proceedings of any ecclesiastical courts."

II. Interference has been in some instances placed upon grounds of public policy: *Rex* v. *Barker*, 3 Burrows 1266; *Runkle* v. *Winemuller*, 4 Har. & McH. 429; and it might under certain circumstances be justified upon the same principles as those invoked for the protection of the right of membership in other associations: 8 Am. Law Reg. (N. S.) 533; but the question in the principal case was considered to be, does the deprivation of a clergyman involve civil or property rights of his own, which *he* can protect by resort to the tribunals created by the superior power of the state to pass upon rights of that character?"

The right to pursue a particular means of livelihood is, of itself, property: *Ex parte Cummings*, 4 Wallace 277; *Ex parte Garland*, Id. 333; *In re Dorsey*, 7 Porter 381. And to the office in question salary and emoluments are attached, there being practically no distinction between "the benefice in English law and the right of a minister to the salary and emoluments attached to a rectorship" in the Episcopal Church: Hoffman's Law of the Church, p. 418. Manifestly, the possession of the particular status, meaning by that term the capacity to perform certain spiritual functions, or to hold certain spiritual offices, carries with it the right to the accompanying emoluments, and the one cannot be taken away

without the destruction of the other: *Forbes* v. *Eden*, 4 Ct. Sess. (3d Ser.) 157; s. c. L. R. 1 Sc. & D. App. 568; *McMillan* v. *Free Church*, 23 Ct. Sess. 1346, 1347; Law Reporter, Dec. 1855, 421–432. The article last referred to, is attributed to Hon. Richard H. Dana, and derives, of course, additional weight from that fact. The writer says: "In the case of a presbyter of the Episcopal Church, the holding the office is essential to his being settled or officiating, and thus obtaining compensation or emolument in any form. He qualifies himself for the office at great expense of time and money, sacrifices all other means of obtaining a livelihood in faith of the contract between himself and the church, that if qualified he shall be admitted, and, if admitted, shall not be prohibited from officiating, and thus earning his living, except for certain causes set forth in the constitution and canons."

It is unnecessary to enlarge. The opinion in the principal case concedes that the right to pursue any lawful avocation is in itself, a thing of value; that salary and emoluments are connected with the rectorship of an Episcopal church parish; and while it is denied that the right to the office of a clergyman is a "vested right" in the sense of a "right that cannot be suspended," it seems to be admitted that such a right exists in a "contingent and restricted" form. But it is said that "the sentence of a church judicatory, in a proper case, deprives of the position, and salary and emoluments are gone."

It is exactly here that the question arises, what if those who assume so to act, are not a judicatory? And if not, is not a civil court bound to interpose as against unlawful deposition or suspension, which takes away the right to office and the payment of salary?

If any proposition would appear to be settled in this country, it is that no man has any power over another in matters either religious or civil, beyond what the law confers, except by that other's own consent. It is possible that courts would hold that such consent might be given even to the extent of enabling a majority to dispose of a minority in any manner, at any time, under any circumstances, or that a particular office-bearer of a church might do so, in matters of ecclesiastical concern, though carrying with them civil consequences, "but such consent to be effectual must be *clear* on the face of the compact. The law will neither presume nor readily infer such consent when civil interests are involved. The liberty of the majority may be the slavery of each individual, and of the whole minority. That is not the kind of liberty which the law of this country favors. Still less does the law favor or even recognise the liberty of one party to a civil contract *to break it with impunity* or *to interpret it in his own favor* to the prejudice of the other party. The interpretation of all contracts belongs to the civil courts, to the extent, in the first instance, of ascertaining whether they involve civil rights; and in the next place, if they do, of vindicating or giving redress for the violation of these rights; and, although every human tribunal must be fallible, history has shown that nowhere else can these powers be so safely lodged."

It is true that the complainant in the principal case did contract and bind himself to submit to the government and discipline of the Protestant Episcopal Church. And if the contract by which that church is constituted and which alone furnished the authority to proceed, bound him to submit to any mode of procedure his ecclesiastical superiors or brethren chose to adopt and to any conclusion they chose in any way to arrive at, it may be he would have no *locus standi* in a civil court, although the law favors not such contracts and never cuts off investigation; but that is the precise

question which the complainant insisted the court should examine into and determine, and which the Supreme Court seems to decide cannot be done. So we drift back to the initial question, what position a church occupies in this country. If in law, they are mere voluntary associations founded *on contract*, then it is not perceived upon what ground courts can decline the investigation, in a proper case, into the terms and conditions of such contract, and the cases cited *ante* fully sustain this view.

This is a logical conclusion from the separation between church and state. The effect of such separation was to forbid an ecclesiastical establishment; to deny to the regulations of the church, the legislative sanction, and to her adjudications the authority of judicial decisions; to leave the churches in this country to stand not as ecclesiastical but civil bodies: Tyler on Ecclesiastical Law, § 104. It is insisted, however, that "causes spiritual must be judged by judges of the spiritualty, and causes temporal by temporal judges;" and the statute 24 Henry VIII. is cited. This statute is, however, no authority for the proposition, for it was passed *alio intuitu*. The king having secretly married Anne Boleyn, had determined on a rupture with Rome. The independence of the kingdom from all foreign jurisdiction was the object aimed at, and in making the assertion, it was natural that the highest dignity should be ascribed to the estates of the realm, and particularly to the spiritualty, on whose authority a most important act was about to be done. The object was to assert the power of the spiritualty of the kingdom against a foreign power, not to define the mutual relations of the spiritualty and temporalty within the realm, with a view to a possible conflict of jurisdiction. Nevertheless, it is substantially true, that spiritual causes pertain to the spiritualty, and it may be admitted, that so long as spiritual sentences are directed to taking their effect upon the consciences both of the culprit and of others, civil courts can not interfere; but when they go farther and *coercive* jurisdiction is claimed for those who pronounce them, and temporal consequences emerge, the case is changed. And the Lord of the Church has Himself clearly indicated that He claimed no temporal jurisdiction for He replied, when "one of the company said unto Him, 'Master, speak to my brother, that he divide the inheritance with me,' 'Man, who made me a judge or a divider over you?' "

It is only in the legitimate exercise of her spiritual power that the church can possess that high sanction which most churches have claimed. If she exceed her due powers, it is usurpation, and the privilege derived from exercising the powers committed by the Divine Founder to His church, is gone.

Whenever his civil or proper rights are involved the clergyman has the right to stand at "Cæsar's judgment seat" as the place "where he ought to be judged," happy if he finds the tribunal before which he appears "expert in all customs and questions which are among" the members of his church association, but confident at least of justice.

III. The intervention will take the shape of injunction whenever recognised grounds of such equity interposition exist. If the case made shows that the complainant is threatened with illegal action, the inevitable result of which is irreparable injury, sufficient ground exists for this form of interference. Any legal remedy is inadequate which is not equivalent to the restoration of the *status quo*. As the opinion under consideration does not discuss this branch of the subject, further allusion to it is not required. Injunctions have been granted in similar cases: *Walker* v. *Wainwright*, 16 Barb. 486; *Hagar* v. *Whitehouse*, Sup. Ct. Chicago, May T. 1863; *Forbes*

v. *Eden*, 4 Ct. Sess. (3d series) 157; *McIntosh* v. *Rose*, 2 Ct. Sess. (N. S.) 255; *Wilson* v. *Stranraer*, 4 Ct. Sess. (N. S.) 1294, Id. 957, 1476; 1298, 911. The formidable objection is not to the remedy but the time of its application. But it was insisted for the complainant that interference after sentence came too late, as *the sentence executed itself*. And to the objection that it could not be known what the sentence would be, it was replied that the law conclusively presumes against those persisting in *illegal action*, the worst that may befall: 1 Greenl. Ev. p. 21, sects. 15, 16, 18, 25, 34; p. 44 *et seq.*; 9 Clark & F. 251; 4 B. & C. 247, 255, 256. The rule that proceedings *at law* will not be enjoined until after verdict and judgment, relates wholly to proceedings of *courts* created by the supreme power of the state. In such cases the jurisdiction of the common law courts is admitted, and injunctions issue upon the ground that such jurisdiction is being made use of contrary to equity, or when the question depends on an *equitable*, arising on a *legal* right, the court requires the admission of the legal right as preliminary to the assertion of the equitable. In a proper case, however, injunction may be granted at *any stage* of the action, as to stay trial, entry of judgment, &c.: 3 Daniell's Ch. Pr. (Perkins Ed. 1865) 1726, 1727.

The subject ought not to be dismissed without some reference to the ecclesiastical proceedings, but the length of this note precludes further discussion. The objections were to the *jurisdiction* of the so-called court, and if they were well taken, were decisive of the case.

M. W. FULLER.

Supreme Court of Colorado.

GRAHAM *v.* WESTERN UNION TELEGRAPH COMPANY.

Telegraph Companies may make reasonable regulations concerning the transmission of messages, but cannot avoid liability for their own want of care or skill in the performance of what they undertake to do.

A regulation that messages must be repeated by being sent back from the station to which they are addressed is reasonable; but where the action is not for incorrect transmission of the message, but for failure to deliver it at all, the non-compliance by the plaintiff with such regulation is no defence.

In an action against a telegraph company for failure to deliver a message to "ship oil as soon as possible," the plaintiff cannot recover for profits he might have made had the message been promptly delivered. Such profits can not be considered as fairly within the contemplation of the parties, and are too speculative and contingent in their nature to be a proper element in the measure of damages.

This was a writ of error from the Arapahoe District Court. The facts are stated in the opinion of the court, which was delivered by

BELFORD, J.—The declaration contains three counts. It is averred that the plaintiff employed the defendant to transmit from Denver, in Colorado, and deliver to Ashton & Tait, in Nebraska City, in Nebraska, the following message: